STATE OF MICHIGAN

COURT OF APPEALS

ANDREW PLOCIENNICZAK, ANNETTE PLOCIENNICZAK, ROBERT MORITZ, and KATHLEEN MORITZ,

Plaintiffs/Counterdefendants-Appellants,

v

JAMES H. DUER III and LAKE MICHIGAN SENIOR LIVING, LLC,

Defendants/Counterplaintiffs-Appellees,

and

KYLE DOYON,

Defendant.

UNPUBLISHED
October 22, 2020

No. 349131
Mason Circuit Court
LC No. 17-000205-CH

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

In this easement dispute, plaintiffs sought to enjoin defendants from using an express easement to access four assisted-living facilities, which defendants plan to build on the dominant estate. Following a bench trial, the trial court denied plaintiffs' requests for injunctive relief. The trial court also entered an order allowing defendants to expand the width of the existing roadway and to grade the roadway with gravel. Plaintiffs appeal as of right. We affirm.

I. BACKGROUND

At issue in this case is an express easement burdening the property owned by plaintiffs Robert and Kathleen Moritz. The Mortizes purchased the property in 1995 and they farm the property as an apple orchard. The easement over the apple orchard benefits two lakefront

properties: (1) property owned by plaintiffs Andrew and Annette Plocienniczak, on which they have a single-family residence; and (2) property (the Lakeshore property) on which defendants plan to build four assisted-living facilities. The easement for the Lakeshore property was created in 1965 when Catherine and Ivan Petterson, who then owned both the apple orchard and the Lakeshore property, conveyed the Lakeshore property to William and Leona Penninga. The 1965 conveyance included a 25-foot-wide easement over the apple orchard property. The easement provides:

> ALSO; together with a right of way, with right to grade such property for road purposes and for public utilities use, described as follows:
>
> Commencing at the Northwest corner post of the NW¼ of SW¼, Section 14, Town 17 North, Range 18 West; thence South 89°43' East, a distance of 215.59 feet along the East-west quarter line; thence South 14°07' East, a distance of 652.31 feet to the point of beginning; thence South 14°07' East 25 feet, thence South 89°45' East to the West line of Lake Shore Drive; thence Northerly along the West line of Lake Shore Drive to a point which is South 89°45' East of the point of beginning, thence North 89°45' West to the point of beginning.

After buying the Lakeshore property, the Penningas built and lived in a single-family home on the land. They later sold the property to Bob Alexander, who lived in the house. He also let a friend live in a trailer on the property. In 2005, Robert Tols purchased the property, removed the trailer, and demolished the house. Tols had plans for a condominium development, and, during this time, the property was approved for division into six lots. However, Tols never sold any of the lots or built any condominiums on the land. In 2009, Tols executed a quitclaim deed, in lieu of foreclosure, to a bank and the condominium project was officially terminated in 2011.

In 2016, defendants purchased the property from the bank with plans to use it for a senior-resident assisted-living facility. Defendants' current plan, which has been approved by the zoning administrator, is to construct four buildings, approximately 3,500 square feet each.[1] The property has been subdivided into four smaller lots for this purpose. Each building will house six residents, and the residents' spouses could also potentially live in the residents' rooms if the spouses were not also in need of care, meaning that12 people could potentially live in each house. Each house would also have one staff member present at all times, and there would be one administrator to oversee all four homes. At the time of trial, one of the buildings had been completed, and two residents had moved into the home. In addition to residents and staff, social visitors, doctors or medical personnel, and commercial vehicles, including propane delivery and garbage trucks to empty dumpsters, would use the easement to access the Lakeshore property.

Historically, the road was an unpaved, two-track dirt road. And, although property records indicate that the easement is 25-feet wide, the existing roadway was only 10- or 12-feet wide. Owners of the Lakeshore property used the two-track to access it. The Mortizes also use the two-

[1] Initially, defendants planned two large buildings that would each house 20 residents. The Planning Commission rejected this initial plan, which would have required a zoning variance.

track roadway for their farm equipment, including heavy equipment like tractors and a spray unit. The Plocienniczaks also have the right to use the easement for access to their property.

Plaintiffs filed the current lawsuit in July 2017. Plaintiffs sought to enjoin defendants from using the easement for access to the assisted-living facilities. Plaintiffs claimed that defendants' proposed use, which plaintiffs characterized as "commercial" in nature, was outside the intended scope of the easement, asserting that the easement was limited to use for single-family residential purposes. Plaintiffs also maintained that the increase in use and the change in the type of use would overburden the easement. The matter proceeded to a bench trial, which included testimony and documentary evidence about the historical use of the properties and the easement, defendants' planned development, and expert testimony on the anticipated increase in traffic that will likely result from defendants' development.

Following trial, the trial court issued a detailed opinion, denying plaintiffs' request to enjoin defendants' use of the easement. In reaching this decision, the trial court made two main determinations relevant to this appeal. First, the trial court concluded that the easement was unambiguous, and the unambiguous language of the grant did not limit the easement's use to residential purposes. Second, the trial court found that defendants' proposed development was residential in nature and that subdivision of the Lakeshore property into four parcels for four residential buildings, and the associated increase in traffic, would not overburden the easement. In a separate order, which modified an earlier preliminary injunction, the trial court ruled that defendants could expand the two-track road to the full 25-foot width of the easement and that defendants could grade the road with gravel.

This appeal as of right followed.

II. STANDARDS OF REVIEW

"The extent of a party's rights under an easement is a question of fact[.]" *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Following a bench trial, we review the trial court's factual findings for clear error. *Charles A Murray Trust v Futrell*, 303 Mich App 28, 50; 840 NW2d 775 (2013). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks omitted).

In comparison, we review de novo questions of law, including the interpretation of statutes or a deed. *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). "Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019).

Finally, we review a trial court's evidentiary decisions for an abuse of discretion. *Mueller v Brannigan Brothers Restaurants & Taverns LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. (quotation marks omitted). "A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected, and it

affirmatively appears that failure to grant relief is inconsistent with substantial justice[.]" *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) (citations omitted).

III. SCOPE AND BURDEN

On appeal, plaintiffs argue that the trial court erred by concluding that the language granting the easement was unambiguous and by interpreting this language broadly to essentially mean that "anything goes." According to plaintiffs, because the grant does not identify a specific purpose, extrinsic evidence was needed to determine the grantors' intent and the trial court abused its discretion by excluding extrinsic evidence from Catherine Petterson, who was one of the original grantors, and Audrey McDonald, a neighbor. Plaintiffs contend that, if the trial court considered the extrinsic evidence, and even on the basis of the evidence admitted at trial, it is apparent that the easement was created for single-family residential purposes. Plaintiffs also maintain that the trial court erred by concluding that defendants' use was "residential" rather than "commercial" and by finding that this proposed use did not overburden the easement. We disagree.

> An easement is a limited property interest; it is the right to use the land burdened by the easement for a specific purpose. The land burdened by the easement is the servient estate, and the land benefited by the easement is the dominant estate. The easement holder's use of the easement is limited to the purposes for which the easement was granted and must impose "as little burden as possible to the fee owner of the land," but the easement holder nevertheless enjoys "all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." The necessity of an easement holder's conduct can be informed by the purpose and scope of the easement, in addition to the easement holder's accustomed use of the easement. [*Smith v Straughn*, ___ Mich App ___, ____; ___ NW2d ___ (2020) (Docket No. 345391); slip op at 3 (citations omitted).]

To determine the purpose for which an easement has been granted, courts must begin by examining the language of the easement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Id*. "Only where the language in the granting instrument is ambiguous may this Court examine evidence extrinsic to the document to determine the meaning within it." *Blackhawk Dev Corp*, 473 Mich at 42. Generally, a provision is "ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005).

Once the scope or purpose of the easement has been determined, the question becomes whether the easement holder's particular use is permissible "under the law of easement." *Little*, 468 Mich at 701. That is, even when an easement generally grants the right to use the land for a specific purpose, the exercise of that right cannot involve use or activities unnecessary for the reasonable and proper enjoyment of the easement and the dominant estate holder cannot unreasonably burden the servient tenement. *Id*. "The necessity and reasonableness of the use made of the easement by the dominant estate are questions of fact, limited only by what may be deemed necessary and reasonable to the enjoyment of the easement." *Unverzagt v Miller*, 306 Mich 260, 266; 10 NW2d 849 (1943).

In this case, with regard to overburdening in particular, the question "is whether the acts complained of increase the burden on the servient estate beyond that contemplated at the time the easement was created." *Bang v Forman*, 244 Mich 571, 573; 222 NW 96 (1928). "The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Schadewald v Brule*, 225 Mich App 26, 36; 570 NW2d 788 (1997). However, "a mere increase in the number of persons using an unlimited right of way to which the land is subject is not an unlawful additional burden." *Henkle v Goldenson*, 263 Mich 140, 143; 248 NW 574 (1933). For instance, "[i]f a dominant estate with easement rights is divided, all resulting parcels take a share in the easement as long as an unreasonable burden is not imposed upon the servient estate." *Morse v Colitti*, 317 Mich App 526, 538; 896 NW2d 15 (2016). More broadly, it is generally recognized that "manner, frequency, and intensity" of the grantee's use of the easement may change through time with "developments in technology and to accommodate normal development of the dominant estate," provided the resulting burden is not unreasonable. *Mich Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 379 n 42; 699 NW2d 272 (2005) (quotation marks omitted). Such normal changes in manner, frequency, and intensity are typically considered to be "necessary for the enjoyment of the easement" and burdens "contemplated by the parties." Bruce & Ely, The Law of Easements & Licenses in Land, Utilization and Maintenance of Easements, § 8:4 (2020).

A. EXCLUSION OF EXTRINSIC EVIDENCE

Contrary to plaintiffs' arguments regarding the scope and purpose, the document granting the easement is not ambiguous. See *Royal Prop Group, LLC*, 267 Mich App at 715. And accordingly, extrinsic evidence was not admissible to determine the scope or purpose of the easement. See *Little*, 468 Mich at 700. Specifically, the easement was granted as follows: "ALSO; together with a right of way, with right to grade such property for road purposes and for public utilities use . . . ." By asserting that the interpretation of this grant requires consideration of extrinsic evidence, plaintiffs contend that the phrase "right of way" is ambiguous because it does not identify a specific purpose. For example, it does not specify a right of ingress and egress for residential purposes or commercial purposes or both. We disagree.

The grant provides for a "right of way," absent conditions or restrictive language. The conveyance of a right of way generally gives the grantee "a right to an unobstructed passage at all times over" the land in question as well as "such rights as are incident or necessary to the enjoyment of such right of passage." *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). Although a grantor, in drafting the grant, may certainly choose to limit use of a right of way to finite purposes, see *Mich Dep't of Natural Resources*, 472 Mich at 379 n 42, it is a fundamental rule of interpretation that we will not rewrite contract provisions or add additional terms. See *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 85; 910 NW2d 691 (2017). Moreover, when an easement contains words that "are more general, the intent will be determined accordingly." *Blackhawk Dev Corp*, 473 Mich at 48 n 8. Given the general language in the easement in this case, and in the absence of limiting language, the grant as written—creating an easement "right of way" for the benefit of the Lakeshore property—cannot reasonably be read as intended to "limit or disturb the full and unrestricted enjoyment of the easement granted." See *Harvey*, 85 Mich at 323. In other words, the general grant of a "right of way" without any restrictions can only be reasonably construed as creating a broad easement right. It cannot plausibly be read to prohibit commercial uses or to create an easement with ingress and egress

limited to particular purposes—such as single-family residential purposes—as contended by plaintiffs. See *Henkle*, 263 Mich at 143 (characterizing "right to use" private road as creating an "unlimited right of way"); see also *Unverzagt*, 306 Mich at 266 (recognizing that dominant estate holder's invitees could also use easement "[i]n the absence of express restrictions in that regard in the grant").

Plaintiffs contend that, if the grant is read to impose no limitations on the scope of the easement, then "anything goes" and defendants' rights will be essentially "unfettered." This is unfounded. Rather, it is well-recognized that "a right-of-way granted in general terms" creates "a broad right to use the easement *for all reasonable purposes*." Bruce & Ely, The Law of Easements & Licenses in Land, Utilization and Maintenance of Easements, § 8:4 (2020) (emphasis added). "In other words, an unlimited conveyance of an easement is in law a grant of unlimited *reasonable use*." *Kirby v Meyering Land Co*, 260 Mich 156, 169; 244 NW 433 (1932) (quotation marks omitted; emphasis added). Consequently, although the purpose of the easement is unrestricted, limitations on reasonable use and minimal burdening of the dominant estate would apply to limit defendants' activities and to protect the Mortizes as the servient estate holders. See *Unverzagt*, 306 Mich at 265. Ultimately, although the easement in this case is broad, it is nonetheless unambiguous. And accordingly, the trial court did not abuse its discretion by excluding extrinsic evidence to determine the scope of the easement. See *Little*, 468 Mich at 700.

Although extrinsic evidence was not admissible to interpret the scope or purpose of the easement, evidence from Catherine Petterson and Audrey McDonald about the establishment of the easement and the historical use of the easement may have been relevant to the question of whether defendants' planned development would overburden the easement beyond what was contemplated when the easement was created. That is, even activity related to a use generally permissible under the language of an easement may be prohibited if it unlawfully increases the burden on the servient estate. See *Henkle*, 263 Mich at 143. And, evidence regarding the circumstances when the easement was created, the character of the neighborhood, customary usage of the easement, and anticipated development would be relevant to a determination of overburdening. See *id*.; *Smith*, ___ Mich App at ___; slip op 3; *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 132; 737 NW2d 782 (2007); Bruce & Ely, Bruce & Ely, The Law of Easements & Licenses in Land, Changes or Increases in Utilization, § 8.13.

However, even if the evidence in question in this case was admissible for this purpose, the trial court's exclusion of this evidence does not warrant relief on appeal because the exclusion of the evidence did not affect plaintiffs' substantial rights and it would not be inconsistent with substantial justice to deny relief. See MCR 2.613(A) (stating that a harmless error is not grounds for disturbing a judgment). Specifically, plaintiffs provided an offer of proof regarding Catherine Petterson's and Audrey McDonald's proposed evidence, see MRE 103(a)(2), and the relevant evidence Catherine and McDonald could have offered was undisputed and cumulative of other evidence. There was no factual debate regarding the various property transfers, the historical use of the Lakeshore property, the character of the neighborhood, or the historical use of the easement. Indeed, in its opinion, the trial court accepted these facts as true. On this record, any potential evidence from Catherine and McDonald was at best cumulative. Accordingly, even if the trial court abused its discretion by excluding this evidence, plaintiffs would not be entitled to relief. Cf. *Dunn v Nundkumar*, 186 Mich App 51, 54; 463 NW2d 435 (1990); *Matter of Virginia Park*, 121 Mich App 153, 165; 328 NW2d 602 (1982). Therefore, plaintiffs' evidentiary errors lack merit.

B. RESIDENTIAL AND OVERBURDENING FINDINGS

Although the trial court determined that the easement grant did not prohibit commercial activities or limit use to residential purposes, the trial court also determined that defendants' planned facilities were in fact residential. And the trial court found that subdivision of the dominant estate for this residential development and the associated increase in traffic did not overburden the easement. On appeal, plaintiffs argue that the trial court erred by relying on MCL 125.3206(1) and *Livonia v Dep't of Social Servs*, 423 Mich 466; 378 NW2d 402 (1985), to determine that defendants' facilities constituted a residential use of property as a matter of law. According to plaintiffs, rather than consider the issue as a question of law, the trial court should have engaged in fact-finding to determine whether defendants' proposed development was commercial or residential in nature. While there is some merit to plaintiffs' argument regarding MCL 125.3206(1), we conclude that any error of law does not warrant relief, given the trial court's alternate analyses and its findings of fact.

Particularly, in rejecting plaintiffs' assertion that defendants' planned facility was commercial in nature, the trial court cited MCL 125.3206(1) and *Livonia* for the proposition that "[t]he legislature and the Supreme Court have settled any argument that small group homes such as [defendants'] senior living facilities are a commercial use of the property." MCL 125.3206(1)[2] is a zoning statute; thus, the statute's recognition that a state-licensed residential facility constitutes a "residential" use applies in the context of zoning decisions. This case is not a zoning dispute; it is a property dispute involving a private easement that is contractual in nature. "Zoning laws determine property owners' obligations to the community at large, but do not determine the rights and obligations of parties to a private contract. These are separate obligations, both of which may be enforceable." *Livonia*, 423 Mich at 525 (quotation marks omitted). In other words, the fact that defendants' proposed use of the Lakeshore property does not violate zoning laws is not determinative of the easement questions in this case. See *Morse*, 317 Mich App at 549 & n 15. The trial court erred by looking to a zoning statute to resolve a private easement dispute.

Nevertheless, this error does not warrant relief because the trial court provided several alternative grounds for its decision, rendering any improper reliance on MCL 125.3206(1)(a) harmless. First, as discussed earlier, the trial court correctly concluded that the deed did not limit

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[2] MCL 125.3206(1) states, in pertinent part, as follows:

> Except as provided in subsection (2), each of the following is a residential use of property for the purposes of zoning and a permitted use in all residential zones and is not subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone:
>
> (*i*) A state licensed residential facility.

And, a "state licensed residential facility" is "a structure constructed for residential purposes that is licensed by the state under the adult foster care facility licensing act, and provides residential services for 6 or fewer individuals under 24-hour supervision or care." MCL 125.3102(t) (citations omitted).

defendants' use of the easement to "residential" purposes or prohibit "commercial" activities, making it largely irrelevant whether defendants' facility is "residential" or "commercial" in nature.

Second, to the extent the trial court reached the question as to whether the facility was residential in nature, the trial court additionally relied on *Livonia* for the proposition that defendants' proposed development was residential. Unlike the zoning provisions in MCL 125.3206(1), *Livonia*, 423 Mich at 528-529, involved restrictive covenants that were contractual in nature. Moreover, *Livonia*'s basic holding—that a group home "constitutes a residential use of property"—has application to private agreements regarding property use. *Id*. at 528.

Plaintiffs contest the applicability of *Livonia* on two grounds. First, plaintiffs assert that *Livonia*'s understanding of "residential" use could not have been within the Pettersons' contemplation in 1965 because *Livonia* was decided in 1985. Second, plaintiffs contend that *Livonia* is factually distinguishable. We disagree.

Contrary to plaintiffs' assertions, *Livonia* was not the first case to recognize that residential use of property does not necessarily involve occupation by a traditional family unit. See, e.g., *Boston-Edison Protective Ass'n v Paulist Fathers*, 306 Mich 253, 256; 10 NW2d 847 (1943) (concluding that five unrelated priests residing together in one home did not violate a restrictive covenant). Accordingly, we reject plaintiffs' contention that *Livonia* adopted a broad view of "residential" use that the Pettersons could not have been contemplated in 1965. Further, plaintiffs are mistaken that *Livonia* stands for the proposition that "residential" use requires occupants to function as a single-family unit. Indeed, the two separate issues in *Livonia* were whether the use was "residential" and whether the home was being used as a "single-family dwelling." *Livonia*, 423 Mich at 524-528. There is simply no merit to plaintiffs' contention that "residential" use is limited to a single-family house occupied by a traditional family unit. See *id*.; see also *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007) (defining " 'residential' "). Accordingly, to the extent the trial court found it necessary to determine whether defendants' proposed use of the property was residential, the trial court did not err by applying *Livonia* to conclude that defendants' facilities were residential in nature.[3]

Moreover, contrary to plaintiffs' contention that the trial court relied on MCL 125.3206(1) and *Livonia* to avoid making necessary factual findings, the trial court did consider the specific facts of this case to determine, as a factual matter, that defendants' proposed development was residential. See MCR 2.517(A)(2). The trial court stated:

[3] In plaintiffs' attempt to distinguish *Livonia*, and to establish that defendants' development is not residential, plaintiffs also emphasize that *Livonia* involved only one residence—compared to the four homes in this case—and that *Livonia*, while mentioning the risk of increased traffic issues, did not involve evidence of the specific traffic increase—whereas the parties in this case offered evidence of the specific increased traffic burden. However, these concerns do not relate to whether defendants' proposed use of the property is "residential" in nature. Rather, these concerns relate to whether the easement will be overburdened. Cf. *Livonia*, 423 Mich at 529 (concluding that parking and traffic concerns did not render property commercial, but potentially implicated covenants involving "annoyance or nuisance").

> This Court considers the homes to be similar to residential rental property that is typically permitted in areas zoned residential. The senior residents are renting living space in these homes and paying for assistance with daily living activities. An attendant who helps the senior residents with daily living is not so different from a residential property caretaker or maid who assists a residential property owner with household tasks, or a privately hired personal assistant for an owner/renter, regardless of age and disability. A property manager is part of [defendants'] plan. It is not unusual for an owner of residential rental property to provide for a property manager who lives onsite and collects the rents and manages the day-to-day operations of the property. This senior assisted living facility is a residential rental facility and it cannot be barred from property zoned for residential use.

Overall, given the evidence presented at trial regarding the nature of the planned group homes, the trial court's findings regarding the residential nature of the development were not clearly erroneous. See *Charles A Murray Trust*, 303 Mich App at 50.

The only remaining issue regarding defendants' proposed use is whether the subdivision of the dominant estate and the associated increase in traffic constitutes an unlawful overburdening of the easement. The trial court rejected this argument, likening the case to *Henkle*, 263 Mich at 143, distinguishing the current facts from *Bang*, 244 Mich at 573, and concluding that the subdivision and increase in traffic would not overburden the easement.[4] Given the record evidence, the trial court did not err by rejecting plaintiffs' overburdening claim. As in *Henkle*, 263 Mich at 143, the owner of the Lakeshore property had the right to subdivide the land, and the mere increase in traffic resulting from subdivision of the property into four lots did not unreasonably burden the easement.[5] See also *Morse*, 317 Mich App at 538. Indeed, parties to an easement are typically considered to have contemplated that the "manner, frequency, and intensity" of the grantee's use of the easement may change through time with "developments in technology and to accommodate normal development of the dominant estate." *Mich Dep't of Natural Resources*, 472 Mich at 379 n 42 (citation omitted). See also Bruce & Ely, The Law of Easements & Licenses in Land, Utilization and Maintenance of Easements, § 8:4 (2020). On the whole, the trial court did not clearly err by concluding that defendants' subdivision of the dominant estate to build four assisted-living facilities and the associated increase in traffic on the easement did not overburden the servient estate.

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[4] Compare *Henkle*, 263 Mich at 143 (concluding that subdivision and conveyance of easement rights to five persons did not constitute unlawful increase in burden) with *Bang*, 244 Mich at 573 (determining that subdivision into 26 smaller lots constituted undue burden on easement).

[5] Indeed, while plaintiffs stress their "commercial" view of defendants' development, the evidence regarding overburdening of the easement was that four single-family residences would produce between 38 and 54 daily trips compared to 59 daily trips expected for the four assisted-living homes. Whether "commercial" or "residential," there is not a substantial difference between the expected traffic for defendants' development and what would be expected for four single-family "residential" homes.

IV. IMPROVEMENTS TO THE EASEMENT

Finally, plaintiffs argue that the trial court erred by allowing defendants to expand the width of the roadway to 25 feet and to add gravel to the dirt path. Plaintiffs assert that these changes were unnecessary and unreasonable improvements, given that a 12-foot wide, dirt two-track provided reasonable access to the Lakeshore property for more than 50 years. Relying on *Kirby*, 260 Mich at 169, plaintiffs assert that defendants were not entitled to a "wholly unobstructed right of way or passage over every inch" of the easement. Additionally, plaintiffs maintain that the trial court failed to make appropriate findings regarding the necessity and burden of the improvements, and plaintiffs assert that the trial court failed to properly consider the Mortizes' rights, as the fee holders, to use their property. We disagree.

An easement providing a right-of-way "gives to the grantee not only a right to an unobstructed passage at all times over defendant's lands, but also such rights as are incident or necessary to the enjoyment of such right of passage." *Harvey*, 85 Mich at 322. This includes the right to repair and improve an easement as necessary for the use for which it was given. *Morse*, 317 Mich App at 545; *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976).

> However, a fundamental principle of property law is that the holder of an easement cannot make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient estate. A two-step inquiry has evolved for repairs or improvements to an easement. The first inquiry is whether the repair or improvement is necessary for the effective use of the easement. The second inquiry is whether the repair or improvement unreasonably burdens the servient estate. [*Morse*, 317 Mich App at 545 (quotation marks and citations omitted).]

As compared to the easement holder, "[t]he owner of the fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement." *Harvey*, 85 Mich at 322. However, "[t]he rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil." *Id*.

> The rights of the [easement holder] must be measured and defined by the purpose and character of the easement. There must be a due and reasonable enjoyment by both parties—those who hold the dominant right, as well as those who own the fee. The use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land. [*Unverzagt*, 306 Mich at 265.]

"What may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to [the easement holder's] beneficial use and enjoyment, are questions of fact[.]" *Harvey*, 85 Mich at 322.

In this case, in approving defendants' request to widen the easement and gravel the roadway, the trial court reasoned:

> I'm troubled by a number of things here, and what I'm troubled about is that there's a specific grant of an easement that Plaintiffs are now asking this Court to,

essentially, narrow the easement in a fashion that is, in this Court's opinion, inconsistent with the language of the easement.

The language of the easement is a 25-foot wide easement for road purposes, and to the extent that you might need to have two people pass on that road, you can't do it on the single road that's there right now.

* * *

Now, all along the south side of the easement property, beginning at the entrance—it's very small—to the point at which the easement goes onto the Plocienniczak property, where it gets larger, is brush. Brush is what appears to this Court to be something like autumn olive or Russian olive, small scrub brush that has grown up in the easement area, and I'm going to order that [defendants] can remove that brush. That's number one.

Number two, I'm going to permit, pursuant to the terms of the easement, [defendant] to grade everything between the orange lines, except for those trees, and they're not to damage, or hurt, or cause damage to the trees that might result in killing those trees.

Branches that extend from those trees into the easement may be trimmed up to, at this point, ten feet. If there's a request for it to be higher, I'm going to have [to] hear that request and why.

The easement may be graded, because much—some of that easement may simply be sand, or clay, or non-passable material. Road grade gravel may be added to protect it. Road graded, however, is a term. There's various grades. There's the prime grade used by the county or better is what this Court intends. I don't know what that is, 22A or something like that. I don't want junk out there.

The grading must not create a new nuisance for either Plocienniczak or [Mortiz]. That means, by nuisance, must not create any new drainage onto the property. There will be some at the low point of the orchard and easement on the north side of the easement, because there's a natural dip that gathers around the portion of the orchard that appears not to be in current use for harvesting apples. I see a lot of apples on the ground there, and the trees look kind of old. There—further to the west is a very much in-use orchard, and I don't want anything damaging that orchard, and I want that easement off that orchard area.

In explaining its decision, the trial court further noted that it allowed the trimming of mature pine trees because there were branches low enough to impede traffic. In contrast, the trial court indicated that there had been no showing that it was necessary to remove these trees given that the trees were not significantly "impinging" on the easement. Indeed, the trial court emphasized that the Mortizes' trees were not to be harmed. And the trial court specified that paving the roadway would not be allowed because it was an improvement not warranted by the easement's reference to "grading." Instead, in allowing use of gravel to grade the road, the trial court noted that the gravel would prevent "muddy slop" and potentially help protect the root structure of the trees.

The trial court's findings are not clearly erroneous, and the trial court did not err by allowing defendants to widen the easement and add gravel. A determination whether improvements are necessary or overburden an easement begins with consideration of the language of the easement. *Blackhawk Dev Corp*, 473 Mich at 42. As the trial court emphasized, the easement in this case expressly provides that the easement is 25-feet wide and that it includes, not only a right-of-way, but also the "right to grade such property for road purposes." Given the language of the easement, grading the easement and widening the easement to its full width were within the original parties' contemplation at the time the easement was granted, and, as matters contemplated by the parties, these improvements do not evince overburdening. See *id*. at 47. Indeed, "[w]here the rights to an easement are conveyed by grant, neither party can alter the easement without the other party's consent." *Id*. at 46; see also 3 Tiffany Real Property (3d ed.), § 805 (recognizing that, when there is an express easement, generally "the terms of the grant will not be so far departed from as to take from one of the parties rights expressly granted as to the width of a way, and give them to another").

Regarding necessity, the trial court noted that the current roadway is narrow, particularly in areas with brush and low tree branches intruding on the easement, and the narrowness makes it difficult for two cars to pass. Further, the trial court, after visiting the property, indicated that the current surface included "non-passable" materials, such as clay or sand. In contrast, plaintiffs emphasize that the two-track has historically be used to access the Lakeshore property without issue or need for improvement. Although accustomed use of an easement is relevant to the determination of necessity, see *Smith*, ___ Mich App at ___; slip op at 3, it is not dispositive. The purpose and scope of the easement are also relevant. See *id*. In this case, the trial court's findings demonstrate that widening the easement to its full width and grading the easement with gravel were necessary for effective use of the easement for its intended purpose and scope as a right-of-way, with grading for road purposes, to access the Lakeshore property. See *Morse*, 317 Mich App at 545. The trial court did not clearly err.

Moreover, although plaintiffs contend that the trial court's ruling denies the Mortizes the use of their property as the fee holders, the record shows that the trial court carefully considered the Mortizes' property rights and endeavored to burden the Mortizes' property as little as possible. See *Unverzagt*, 306 Mich at 265. For example, the trial court forbade paving the easement, concluding that paving was an improvement not contemplated by the easement grant. Cf. *Mumrow*, 67 Mich App at 700. Further, although plaintiffs contend that the trial court's decision is inconsistent with *Kirby*, 260 Mich at 169, a review of the record demonstrates that the trial court did not unnecessarily provide defendants a "wholly unobstructed right of way or passage over every inch" without regard to the Mortizes' rights and use of their property. To the contrary, the trial court took pains to protect the mature pine trees on the Mortizes' property, concluding that defendants had not shown removal of the trees was necessary given that the trees did not significantly impede the easement. Cf. *id*. Aside from the pine trees, plaintiffs have not identified any use of the property by the Mortizes that has been impacted, and they have not explained what due and reasonable use of the property the Mortizes were erroneously denied in view of the easement holder's paramount rights. See *Unverzagt*, 306 Mich at 265; *Harvey*, 85 Mich at 322.

In sum, given the language of the easement and the facts presented, the trial court's factual findings were not clearly erroneous, and the trial court did not err by allowing defendants to widen the easement to its full 25-foot width and to grade the roadway with gravel.

Affirmed.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford